SUPREME COURT, U. S.

DEC 13 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 835

D. K. OVERMYER WAREHOUSE CO., INC., an Ohio corporation, GREEN & WHITE CONSTRUCTION CO., INC., a Delaware corporation, and LIBERTY MUTUAL INSURANCE CO., a Massachusetts corporation,
Petitioners

v.

FLORIDA STEEL CORPORATION, a Florida corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, MIAMI, FLORIDA

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Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of Florida, Third District, dismissing as frivolous petitioner's appeal from an adverse judgment for some $25,000 rendered by the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County.

On November 4, 1968, the Supreme Court of Florida, declined a petition for certiorari, by a court which divided 2 to 1.

OPINIONS BELOW

No opinion was written by any of the Florida courts.

JURISDICTION

The order of the Supreme Court of Florida denying certiorari was entered October 2, 1968, and a motion for rehearing was thereafter denied on October 31, 1968. The jurisdiction of this Court is invoked under Title 28 U.S. Code, § 1257(3).

QUESTION PRESENTED

Since the Florida Constitution gives an appeal as a matter of right, may the appellate court strike from appellant's brief copies of a public ordinance involved in the appellate argument, and then without notice or hearing summarily dismiss the appeal as frivolous?

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment 14: . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Constitution of 1885 (Fla. Stat. Ann. 1967): Art. 5, § 5 (3) *Jurisdiction.* Appeals from trial courts in each appellate district . . . may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the Supreme Court or to a circuit court.

STATUTE INVOLVED

Pertinent excerpts from the South Florida Building Code, adopted by the Board of County Commissioners, Dade County, Florida, are reproduced in the Appendix to this petition (5a-10a).

STATEMENT

Petitioner Green & White Construction Company had contracted to build a warehouse in Dade County, Florida, for the Overmyer Warehouse Company of Ohio. Liberty Mutual was the surety on the construction contract.

Respondent Florida Steel Corp. furnished the open-web steel joists for the roof, and for this material brought suit in the Circuit Court of Dade County for the invoiced amount of approximately $22,000, plus attorneys' fees.

At the trial which was conducted before a judge without a jury, an issue of fact as to the existence of defects was raised by the defendants which claimed a deviation from the required straightness and failure to meet the standards of vertical alignment. The trial court rendered judgment for the plaintiff and defendants appealed. Appellants contended that the Building Code (a municipal ordinance) automatically was embraced in the contract between the parties and that the materials furnished could not be approved or evaluated except by reference to this Building Code.

In order to document this argument appellants attached to the brief photocopies of the Building Code showing it was adopted by the County Commissioners for application throughout Dade County (App. 5a-7a). Since that Building Code incorporated by reference the specifications of the American Institute

of Steel Construction, the pertinent part of those specifications was likewise attached to the brief as an exhibit (App. 9a). Those specifications establish the tolerances for straightness and over-all deviations, describing the limits of acceptability and these were also offered as an exhibit.

The standard specifications used by the Steel Joist Institute and the American Institute of Steel Construction were attached, with a photograph showing the placement of these structural members, purely as a matter of illustration.

Appellants sought to indicate the importance of having these steel members properly fabricated in order "to provide for the safety of workers and others during these operations and to regulate the equipment, material, use and occupancy of all buildings" as spelled out in the "purpose clause" of the Building Code (App. 7a).

Accordingly, an authoritative engineering study, "Building Failures, Case Studies in Construction and Design" by Thomas H. McKaig, Consulting Engineer (McGraw-Hill, 1962), was reproduced in part. A study was noted of the collapse of the Brooklyn Theatre, causing the deaths of seven men. The indications were that the failure of one joist would produce a domino effect pulling down the others in rapid succession. Appellants argued that this public safety standard of municipal law of the forum, employed in this Building Code, could not be ignored by the parties, and by the trial court. The Court of Appeal was asked to remand for findings as to whether or not the joists in question complied with the law, or violated the law and constituted a hazard to the public

safety, hence did not constitute recoverable performance of plaintiff's contract.

No decision on this subject was rendered, but the plaintiff moved to strike the brief because the exhibits attached had not been presented to the trial court. This was joined with a motion to quash the appeal. The Court of Appeal ordered the exhibits stricken, but denied the motion to quash the appeal (R. 96). Thereafter, without notice or hearing on the matter, the Court of Appeal reversed its earlier order denying the motion to quash, and announced that since the exhibits were not before the Court, the appeal was frivolous and it was accordingly dismissed (R. 98). The Supreme Court of Florida denied certiorari by a divided court (R. 105) subsequently denying a petition for rehearing on October 31, 1968 (R. 106).

REASONS FOR GRANTING THE WRIT

The Florida Court Has Unconstitutionally Denied Petitioners the Appeal of Right Guaranteed by the Florida Constitution, and Routinely Afforded to Florida Citizens, Thereby Denying Petitioners Due Process of Law and Equal Protection.

After the Court of Appeal had granted a motion to strike the exhibits from appellants' brief, but declined to strike the brief and dismiss the appeal, that same court, without notice or an opportunity to be heard, summarily dismissed the appeal because the argument was not supported by the exhibits. This would be tantamount to taping a prisoner's mouth shut and then finding him guilty because he had offered no defense; or emasculating a party and rendering judgment against him by default because his voice had not been heard to state a defense. Possibly it would

be similar to amputating a party's legs and then dismissing his case for lack of standing.

Examination of the Florida Constitution of 1885 (supra) shows that the appeal is a matter of right. This right obviously cannot be arbitrarily and summarily denied without notice and a hearing, after an explicit decision to the contrary, when the appellate court itself has altered the basis upon which the appeal is brought.

It seems clear that the Court of Appeal should have examined the papers, weighed the arguments pro and con, with or without the exhibits, and performed its constitutional duty under Florida law by reviewing the proceedings below and ordering such judgment as justice requires. To strike the exhibits and then hold the argument frivolous is indeed making a mockery of the right of appeal, since this case raised serious questions of a justiciable nature. The record will show that the application for rehearing in the Court of Appeal asserted the right to an adjudication on appeal under the Constitution of the State of Florida and the Constitution of the United States (App. 3a). The same position was taken before the State Supreme Court in connection with the petition for certiorari and the petition for rehearing following denial (App. 2a).

The Florida Supreme Court has made it plain that in such cases as this, presenting "a substantial justiciable question" the appeal may not be dismissed as frivolous even though reversal of the lower court is unlikely. *Treat* v. *State ex rel. Mitton,* 121 Fla. 509, 163 So. 883, 884 (1935), and it seems to be thoroughly accepted that a case should not be dismissed as frivolous except

in extreme circumstances. *Moist* v. *Belk,* 380 F.2d 721 (7th Cir. 1967), *cert. denied,* 389 U.S. 960 (1967); *Cohen* v. *Curtis Publishing Company,* 333 F.2d 974 (8th Cir. 1964), *cert. denied,* 380 U.S. 921 (1964).

It is submitted as fundamental that due process of law and equal protection ordained under the Fourteenth Amendment are essentially requirements of fairness, not only for citizens of Florida, but also for those who come from all the other States of the Union. When they have court proceedings to be heard it seems fundamental that those proceedings should go forward on the basis of the documents as presented and not as eviscerated and castrated in summary session without notice and without hearing. Right or wrong the appellant is exercising a right given by the Florida Constitution and the Federal Constitution which requires that his enjoyment of that right be identical in scope with every other litigant in the same posture. At the very moment when the Court of Appeal ordered the exhibits deleted from the brief, it declined to quash the brief itself and dismiss the appeal. Subsequently it did exactly that, without notice or an opportunity to be heard.

It is thoroughly well recognized that due process of law does not require appellate review, *McKane* v. *Durston,* 153 U.S. 684 (1895), but when the Constitution of the State of Florida gave that right of appeal as a matter of right, it cannot be lawfully granted to some and withheld from others, such as these petitioners. "It must meet the requirements of due process and the equal protection clause." *Chapman* v. *State of Texas,* 242 F. Supp. 378, 381 (S.D.Tex. 1965); *Donnell* v. *Swenson,* 288 F. Supp. 317 (W.D.Mo. 1966). *Cf. Griffin* v. *Illinois,* 351 U.S. 12 (1956).

The rule was very neatly put in *United States* v. *Smith,* 200 F. Supp. 885, 919 (D.Vt. 1961) where the Court said:

> While a state is not required by the Constitution of the United States to provide appellate courts or a right to appellate review at all, once a state establishes a system of appellate review —particularly in criminal cases—then " * * * at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like [petitioner] from invidious discriminations." citing *Griffin* v. *Illinois, supra.*

While it must be confessed this issue seems to be raised in criminal cases, as shown by the cases, the rules are the same for civil matters where constitutional principles are involved.

CONCLUSION

The District Court of Appeal of Florida denied petitioners' right of appeal guaranteed by the Florida Constitution, without notice or hearing. Petitioners have been denied due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment, U.S. Constitution. It is prayed the Court grant certiorari and remand the cause to the District Court of Appeal of Florida for the Third District with directions to hear and decide the appeal on the merits.

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